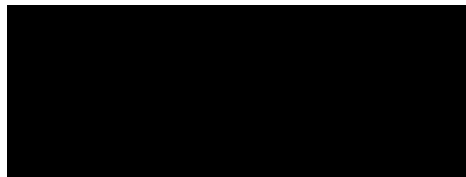




U.S. Citizenship
and Immigration
Services

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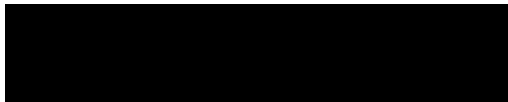
Office: CALIFORNIA SERVICE CENTER

Date: JUL 8 2004

IN RE:

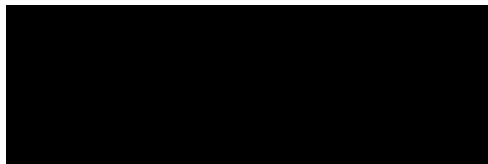
Petitioner:

Beneficiary:



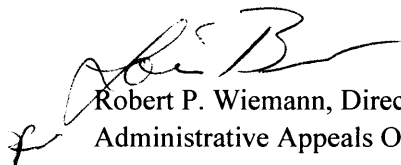
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a board and care home for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 8, 1996. The proffered wage as stated on the Form ETA 750 is \$2002 per month, which equals \$24,024 per year.

With the petition, counsel submitted copies of the petitioner's 1996, 1997, 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns.

The 1996 return shows that the petitioner declared a loss of \$6,036 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$72,298 and no current liabilities, which yields net current assets of \$72,298.

The 1997 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$15,022 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

The 1998 return shows that the petitioner declared a loss of \$4,703 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

The 1999 return shows that the petitioner declared a loss of \$2,859 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$28,291 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 24, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center specifically that the evidence include copies of annual reports, federal tax returns, or audited financial statements and cover each year from 1996 through 2001. The Service Center also specifically requested Form W-2 Wage and Tax Statements showing the amounts the petitioner paid to the beneficiary during each of those years and copies of the petitioner's Form DE-6 for each of the last four quarters.

In response, counsel submitted copies of the petitioner's 1996 through 2000 tax returns, and a Form 7004 showing that the petitioner had received an automatic extension of time to file its 2001 return. The petitioner also provided the petitioner's California Form DE-6 Quarterly Returns for the first, second, and third quarters of 2002. Counsel did not explain why returns for only three quarters were provided, rather than for the most recent four quarters, as the director requested.

Finally, counsel provided 1996 through 2001 W-2 forms showing that the petitioner paid the beneficiary \$10,100, \$10,800, \$10,350, \$10,800, \$11,000, and 15,385.94 during those years, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 8, 2003, denied the petition.

On appeal, counsel states that the director erroneously focused on the petitioner's net income and failed to "recognize the information contained in the corporate tax returns showing income[,] working capital [sic] and expenses" Counsel concluded that "[the] Petitioner has assets sufficient to meet the requirements of 204 5((J)(2) [sic][.]"

Initially, this office notes that counsel did not apparently intend to cite 8 C.F.R. § 204.5(j)(2), as that regulation is irrelevant to this visa category and to the basis of the director's decision. Counsel apparently intended to cite 8 C.F.R. §204.5(g)(2), the pertinent part of which is set out above.

Counsel's reliance on the amount of the petitioner's total assets is misplaced. A petitioner's total assets are not available to pay a proffered wage as some items included in total assets, its interest in real estate, for instance, are not expected, pursuant to the ordinary course of business, to be converted to cash. Other assets might be expected to be converted to cash, but by no set deadline. Only the petitioner's current assets, those expected to be converted into cash within the coming year, may be considered.

Further, the amount of the petitioner's current assets is not available to pay the proffered wage, until it has been reduced by the amount of the petitioner's current liabilities. The petitioner's current liabilities are those that the petitioner is expected to pay within the coming year. The petitioner's current assets net of its current liabilities are its net current assets. The petitioner's net current assets for each of the salient years will be considered below.

Counsel is incorrect that the director should have considered the petitioner's expenses in some way in determining the petitioner's ability to pay the proffered wage. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income, which is shown on a Form 1120 U.S. Corporation Income Tax Return as taxable income before net operating loss deduction and special deductions.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held, at 1084, that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava* at 1054.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In the instant case, the petitioner established that it employed and paid the beneficiary \$10,100 during 1996. That amount is less than the proffered wage. The petitioner declared a loss during that year and has not demonstrated the ability, therefore, to contribute any amount toward the proffered wage out of its income. The petitioner ended that year, however, with net current assets of \$72,298. The petitioner has demonstrated the ability to pay the proffered wage out of its net current assets.

During 1997, the petitioner paid the beneficiary \$10,800. That amount is less than the proffered wage. The petitioner declared a taxable income before net operating loss deduction and special deductions of \$15,022 during that year. Those amounts, added together, equal \$25,822, which is greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage out of its taxable income before net operating loss deduction and special deductions and its net current assets, combined.

During 1998, the petitioner paid the beneficiary \$10,350. That amount is less than the proffered wage. The petitioner declared a loss during that year and has not demonstrated the ability, therefore, to contribute any amount toward the proffered wage out of its income. Because the petitioner ended 1998 with negative net current assets, it has not shown the ability to pay the proffered wage out of its assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner paid the beneficiary \$10,800. That amount is less than the proffered wage. The petitioner declared a loss during that year and has not demonstrated the ability, therefore, to contribute any amount toward the proffered wage out of its income. Because the petitioner ended 1999 with negative net current assets, it has not shown the ability to pay the proffered wage out of its assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$28,291. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998 and 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.